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THE ROLE OF LAW IN LABOR DISPUTES†

*Archibald Cox**

In the midst of debate on amendments to the Taft-Hartley Act, there is a strong temptation to discuss whether secondary boycotts, jurisdictional strikes or organizational picketings are "good" or "bad"; and if they are bad, to say the law should prohibit them. If one law does not solve the problem, a stronger law must be enacted. Legislators frequently succumb to the temptation. It is all too evident in judicial opinions. Judging by my own occasional testimony before legislative committees, the disease infects even academicians. The best antidote is to force ourselves every now and then to lay aside even the most pressing specific problem and think in terms of general principle without immediate, specific application.

One basic question is whether there are not marked limitations on the usefulness of law that ought to be taken into account more explicitly and be given more weight both in revising labor legislation and in reaching judicial decisions. Which problems can be solved by law? Which are not amenable to legal resolution? How can one group be separated from the other? Such questions are pertinent over the whole range of labor legislation, but in the field of labor disputes, especially strikes and picketing, we have had the greatest experience and at the risk of threshing out old straw can hope to draw some lessons from history.

I

During the latter part of the nineteenth century the rising power of labor organizations made it necessary to develop a public labor policy, at first for solving the immediate problems of labor disputes, but ultimately for curing the underlying social and economic distress. For half a century or more the national labor policy was formulated by the judiciary. The labor injunction involved government intervention into industrial relations no less than statutes and administrative agencies, for the courts are a branch of government. In the labor movement this first phase in the development of labor law left a legacy of deep hatred for the word "injunction" and of distrust for law except as a

† This article is the text of an address delivered by Professor Cox at the Cornell Conference on "Current Problems in Labor Relations and Arbitration," sponsored by the New York State School of Industrial and Labor Relations at Cornell University, in Ithaca, New York, on April 13th and 14th, 1954.

* See Contributors' Section, Masthead, p. 690, for biographical data.

weapon in the struggle for power. To the law there was also bequeathed the slippery doctrine that concerted action by employees may be enjoined at the suit of the employer unless the employees are pursuing lawful objectives by lawful means.¹

The formula is plausible enough; labor unions should not be privileged to pursue "unlawful objectives" or to resort to "unlawful means." The fault is that "unlawful" is used sometimes with its normal connotation and sometimes in a highly Pickwickian sense. If the Operating Engineers refused to furnish men to a highway contractor until the contractor agreed to enter into a conspiracy to rig all bids on State construction projects, the objective would be unlawful because the union was demanding the commission of a criminal offense.² A union which pickets a business establishment for the purpose of inducing the owner to grant it exclusive recognition as bargaining representative in violation of a Labor Board certification has an unlawful objective because it is seeking to accomplish that which the law forbids.³ But what about the union which called a strike to secure a closed shop agreement? At common law employers and unions could lawfully make such agreements and, once made, the courts would enforce them. Oddly enough, however, a strike for the closed shop was forbidden because the objective was "unlawful."⁴ In this context the word meant only that the judges had concluded that the desire to spread union organization through the closed shop was not a sufficient reason for injuring the employer's business. Whether it should have been regarded as adequate is quite beside the point. Only muddled thinking can result from using the term "unlawful" to cover two such different kinds of cases. The substantial differences between (1) concerted activities intended to induce unlawful conduct and (2) concerted activities whose purpose is permissible but unimportant raise sufficient likelihood of different legal consequences so that one concept ought not to cover both. The point requires emphasis because the misleading use of the term "unlawful objective" still plagues labor law in ways presently to be considered.

By 1930 most students of labor law and labor relations thought

¹ Restatement, Torts § 775 (1939).

² E.g., *Converse v. Highway Constr. Co.*, 107 F.2d 127 (6th Cir. 1939).

³ E.g., *Markham & Callow, Inc. v. International Woodworkers of America*, 170 Ore. 517, 135 P.2d 727 (1943).

⁴ A strike for a closed shop has, accordingly, been held a strike for an unlawful purpose. . . . On the other hand, agreements voluntarily made between an employer and a union calling for a closed shop have always been recognized and enforced in this Commonwealth.

Fashioncraft, Inc. v. Halpern, 313 Mass. 385, 388, 48 N.E.2d 1, 3-4 (1943).

that the evils of the labor injunction had been proved beyond dispute. The procedural shortcomings need not delay us—the *ex parte* restraining orders, the long delays, the legalistic verbiage of court decrees, the trial of simple breaches of the peace before an equity judge instead of a jury—for these faults do not go so much to the usefulness of law as to the methods of the judicial administration.⁵ The substantive criticisms require closer attention.

One criticism was that the judges ought not to be deciding large social and economic issues according to their individual or collective predilections. The sharpest accusation was that the courts had one law for business combinations but another for labor unions. The charge was not implausible. When a number of employment agencies agreed to drive their competitors out of business by refusing to furnish seamen to any vessel whose owner did not deal exclusively with members of the combination, the court upheld the combination in the name of fair competition;⁶ but when a labor union refused to furnish men to a contractor unless he agreed to hire all his employees through the union, the same court issued an injunction.⁷ Other decisions seemed to display a lack of understanding of elementary economics. When the United Mine Workers, who had established a union wage scale in Pennsylvania and Ohio, sought to organize the non-union mines in the West Virginia panhandle, the Supreme Court declared that the union could have no interest in labor standards in non-union mines, completely ignoring the effect of the low cost coal upon the entire market.⁸ Even if such decisions were sound policy, the failure to take account of practical economic conditions reduced their acceptability. In any event, what business had judges to decide these questions? If a strike against technological innovation was forbidden in Massachusetts⁹ but permitted in Minnesota,¹⁰ if unions could lawfully engage in organizational picketing in New York¹¹ but not in Ohio,¹² were the judges applying rules of law or issuing personal edicts? Whence did the courts derive authority to make law upon such questions?

⁵ The classic discussion is Frankfurter and Greene, *The Labor Injunction* (1930).

⁶ *Bowen v. Matheson*, 96 Mass. (14 Allen) 499 (1867).

⁷ *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011 (1900).

⁸ *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917). See also *Alco-Zander Co. v. Amalgamated Clothing Workers*, 35 F.2d 203 (E.D. Pa. 1929).

⁹ *Haverhill Strand Theatre v. Gillen*, 229 Mass. 413, 118 N.E. 671 (1918).

¹⁰ *Scott-Stafford Opera House Co. v. Minneapolis Musicians Ass'n*, 118 Minn. 410, 136 N.W. 1092 (1912).

¹¹ *Exchange Bakery & Restaurant, Inc. v. Rifkin*, 245 N.Y. 260, 157 N.E. 130 (1927).

¹² *Crosby v. Rath*, 136 Ohio 352, 25 N.E.2d 934 (1939).

A second criticism was that injunctions were essentially repressive in the sense that they required the employees to desist from using the most effective form of self-help but did nothing to solve the underlying problems that drove men first to organize and then to strike. The *Hitchman* injunction thwarted the United Mine Workers but did not improve the lot of the miners.¹³ The famous *Debs* injunction may have checked the nationwide spread of economic paralysis,¹⁴ but the Pullman workers were left to suffer in the squeeze between successive wage cuts and the constant rents and prices in the company village.¹⁵ In the long run pressing problems require solution. The labor injunction was society's way of emulating the ostrich by sticking its head in the sand.

Third, one should note the difficulties attendant upon the enforcement of an injunction in a labor dispute. I remember one case in which a client asked my senior to obtain an injunction against an unlawful strike. The law was plainly on our side, but we had misgivings about the practical consequences. The client was most insistent, however, until my senior asked him what he wished done if the employees disobeyed the injunction. Should the workers be fined or put in jail? The client said, "No"; he planned to keep on living in that community. Should the leaders be jailed for contempt? Heavens no, that would only make martyrs of them. How about a good stiff fine? No, said the client, if they don't pay the fine or even if they do, they'll become martyrs. My senior pointed out that there was no other legal recourse and asked again how he should handle the problem. After a pause the client said that he did not want an injunction.

The repudiation of the labor injunction in the nineteen thirties cannot be explained by these criticisms alone. Probably the single most important factor was a rising belief in union organization and collective bargaining, which swept aside the existing law simply because it was an obstacle. But the criticisms ought to have raised lasting doubts concerning the usefulness of law in labor disputes.

For a time the general distrust of law in labor relations went beyond mere doubt. During the short, second phase in the history of modern labor law, which was ushered in by the enactment of the Norris-LaGuardia Act in 1932,¹⁶ the prevailing view held that the law served no useful purpose in labor relations save possibly to preserve public order. Within the wide circle of persons interested or participating in

¹³ *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 299 (1917).

¹⁴ *In re Debs*, 158 U.S. 564 (1895).

¹⁵ U.S. Strike Commission, Report on the Chicago Strike (1894).

¹⁶ 47 Stat. 70 (1932), 29 U.S.C. §§ 101 et seq. (1946).

a labor dispute it became lawful to resort to any peaceful measures of self-help without regard to their objective. This was laissez faire par excellence. The labor injunction meant government intervention into labor disputes. The anti-injunction laws freed dog to eat dog; the strong would survive and the weak would go under. If an employer opposed unionization by threats, industrial espionage, discriminatory discharges and the blacklist, the employees might counterattack by strikes and boycotts. If the employees formed a union in an establishment over which another labor organization claimed jurisdiction, the two should fight it out with any peaceful weapon.¹⁷ If the latter union held an economic stranglehold on the business, the sacrifice of employee free will and the employer's business losses were the price of free competition.

The period in which the law was assigned no role in labor relations ended almost as soon as it began. The Wagner Act¹⁸ became law only three years after the Norris-LaGuardia Act. Its enactment marked the return of law, albeit on the other side of the struggle. At first the National Labor Relations Act was confined to the organizational phase of labor relations. None of its provisions expressly restricted strikes or picketing. Section 7 guaranteed the right of employees to engage in concerted activities. Section 13 preserved the right to strike. Within a few years after enactment, a basic inconsistency appeared between the legal duties imposed by the Wagner Act and the Norris-LaGuardia thesis that the law has no role to play in labor disputes.

The inconsistency was sharply revealed in *Floresheim Shoe Store Co. v. Retail Shoe Salesmen's Union*.¹⁹ After rival organizational campaigns, A.F.L. won an election over C.I.O. and was certified as the exclusive bargaining representative by the State Labor Relations Board. C.I.O. continued to picket the shoe stores for the purpose of compelling Floresheim to bargain with it in plain violation of the statutory duty to accord A.F.L. exclusive recognition. Despite the baby Norris-LaGuardia Act²⁰ the picketing was held enjoined on the ground that the labor dispute had been ended by the certification of A.F.L. The good sense of the decision is beyond dispute. It would be an outrage for the law to impose on an employer a legal duty to bargain with one union while it simultaneously withheld legal assistance against another union which was destroying his business because he followed

¹⁷ E.g., *Fur Workers Union, Local 72 v. Fur Workers Union No. 21238*, 105 F.2d 1 (D.C. Cir. 1939), aff'd, 308 U.S. 522 (1939).

¹⁸ 49 Stat. 449 (1935), 29 U.S.C. § 151 (1946).

¹⁹ 288 N.Y. 188, 42 N.E.2d 480 (1944).

²⁰ N.Y. Civ. Prac. Act § 876a.

the legal mandate. Arguably the court should have waited for legislative action, as the Supreme Court waited for the Taft-Hartley amendments to remove the corresponding federal anomaly;²¹ but the argument gives insufficient weight to the traditional judicial function of meshing inconsistent statutes into a coherent body of law.

Unfortunately the *Floresheim* case gave birth to ill-considered progeny. The C.I.O. objective was "unlawful" in the sense that the union was seeking to compel the commission of an unfair labor practice. Other judges took this to mean that there was no labor dispute where a union called a strike or engaged in picketing in pursuit of any "unlawful objective." That slippery concept, which we have analyzed already,²² served as a bridge to the cases in which the union's objective was unlawful only in the sense that the judge considered it an insufficient justification for concerted activities.²³ The fallacy, now imbedded deeply in New York opinions, opened the door to revival of the labor injunction in a wide variety of situations. Picketing for recognition is widely enjoined.²⁴ So are concerted activities supporting union demands which, in the judgment of the court, invade management's prerogatives. It has been held, for example, that picketing intended to influence the location of a dress shop is unlawful.²⁵ Another court held it had jurisdiction to enjoin a strike to secure the reinstatement of a discharged employee solely upon the ground that this was an unlawful labor objective.²⁶

The imposition of legal obligations in labor relations under the Wagner Act restored the law to a place in labor disputes and stimulated judicial erosion of the anti-injunction acts through the objectives test. In the main, however, the revival of the labor injunction was a response to deeper causes: distrust of the growing power of a few unions; resentment toward labor's claim of immunity from regulation; the feeling that

²¹ *United States v. Building & Construction Trades Council*, 313 U.S. 539 (1941).

²² See p. 593 *supra*.

²³ *E.g.*, *Opera on Tour, Inc. v. Weber*, 285 N.Y. 348, 34 N.E.2d 349 (1941); *Schwab v. Moving Picture Operators Local No. 159*, 165 Ore. 602, 109 P.2d 600 (1941).

²⁴ *E.g.*, *Postma v. International Brotherhood of Teamsters*, 334 Mich. 347, 54 N.W.2d 681 (1952); *Katz Drug Co. v. Kavner*, 249 S.W.2d 166 (Mo. 1952); *Tallman Co. v. Latal*, 25 CCH Lab. Cas. ¶ 68,207 (Mo. 1954); *Goodwins, Inc. v. Hagedorn*, 303 N.Y. 300, 101 N.E.2d 697 (1951).

²⁵ *G.H. & Freyberg Inc. v. International Ladies Garment Workers*, 24 CCH Lab. Cas. ¶ 68,098 (N.Y. Sup. Ct. 1954); *cf.* *Huron Stevedoring Co. v. Grogan*, 24 CCH Lab. Cas. ¶ 67,972 (N.Y. Sup. Ct. 1953); *Mittman & Co. v. Huchstadt*, 111 N.Y.S. 2d 100 (Sup. Ct. N.Y. County 1952).

²⁶ *Sound Ship Building Corp. v. Sullivan*, 23 CCH Lab. Cas. ¶ 67,574 (1953); *cf.* *National Shoes Inc. v. Lawson*, 27 Lab. Rel. Rep. (Labor Management) 2247 (N.Y. Sup. Ct. 1951).

the Norris-LaGuardia Act had gone too far in freeing even the most undesirable strikes and boycotts from legal restriction. Whatever the motivation, the path cut by the pendulum's swing was both wide and deep. Several States attempted to outlaw picketing except by employees of the employer.²⁷ Others forbade all organizational picketing either by statute²⁸ or judicial decision.²⁹ And, as is well known, the Taft-Hartley amendments introduced federal restrictions on four kinds of concerted activities:

(1) violence and intimidation;³⁰

(2) secondary boycotts; *i.e.*, the refusal to work for employer A unless he ceases to do business with employer B, with whom the union has its real dispute;³¹

(3) strikes to compel an employer to commit some unfair labor practice such as discharging an employee for belonging (or not belonging) to a particular union,³² or bargaining with the striking union after the NLRB has certified a different representative;³³

(4) jurisdictional strikes over work assignments.³⁴

Although the President recommended slight relaxation of some of these restrictions³⁵ and the Senate Committee on Education and Labor reported legislation to implement his message,³⁶ the general trend of the law, both in legislation and in judicial opinions, is still toward increasing legal intervention in labor disputes. Witness the vote in House Committee on Education and Labor to amend the NLRA to forbid all strikes or picketing by an uncertified union. Consider also the ever-

²⁷ Pa. Stat. Ann. § 211 (Purdon 1941) as amended by Pa. Laws 1947, No. 484; Va. Laws 1946, c. 229. These statutes have been largely ineffective because of the decision in *AFL v. Swing*, 312 U.S. 321 (1941), which cast grave doubt upon their constitutionality.

²⁸ Ore. Comp. Laws Ann. § 662.770. The provision was held unconstitutional by the trial court in *Scherer v. Culinary Alliance and Bartenders' Union*, 25 CCH Lab. Cas. ¶ 68,152 (1954).

²⁹ *Tallman Co. v. Latal*, 25 CCH Lab. Cas. ¶ 68,207 (Mo. 1954); *Matson Navigation Co. v. Brotherhood of Marine Engineers*, 22 CCH Lab. Cas. ¶ 67,057 (Pa. C. P. 1952). In New York most judges appear to be distinguishing between picketing for recognition, which is enjoined, and organizational picketing which is permitted. *E.g.*, *Palermo v. Motto*, 25 CCH Lab. Cas. ¶ 68,173 (2d Dep't 1954); *Cricchio v. Horowitz*, 24 CCH Lab. Cas. ¶ 68,008 (Sup. Ct. 1953). But other cases blur the distinction: *Wood v. O'Grady*, 24 CCH Lab. Cas. ¶ 68,021 (1st Dep't 1953); *Bickford's Inc. v. Mesevich*, 107 N.Y.S. 2d 369 (Sup. Ct. N.Y. County 1952).

³⁰ 61 Stat. 136 § 8(b)(1) (1947), 29 U.S.C. § 148 (Supp. 1952) (Taft-Hartley Act).

³¹ *Ibid.*, § 8(b)(4)(A) and (B).

³² *Ibid.*, § 8(b)(2).

³³ *Ibid.*, § 8(b)(4)(C).

³⁴ *Ibid.*, § 8(b)(4)(D).

³⁵ H.R.Doc. No. 291 83d Cong., 2d Sess. (1954).

³⁶ Sen. Rep. 1211, 83d Cong., 2d Sess. (1954).

increasing judicial restraints imposed by the New York courts, in disregard of the earlier opinions of Chief Judges Cardozo and Lehman.³⁷

II

The current of events raises more general questions than whether to forbid particular kinds of strikes. Was there no validity to the substantive criticisms of the labor injunction which gained acceptance twenty years ago? Were they valid while the labor movement was weak but inapplicable under current conditions? Or are we simply repeating the ancient error of forgetting lessons not learned from personal experience and therefore overlooking fundamental limitations on the usefulness of law in labor disputes?

One limitation, I suggest, results from the necessity of framing restrictions on concerted activities in terms of their objective. When a union is forbidden to put economic pressure on an employer for a specified purpose but is left free to strike for other purposes, the law accomplishes little more than to put a premium on subterfuge. In Massachusetts it was formerly unlawful to strike for a union shop.³⁸ There were few strikes for that purpose, but in collective bargaining negotiations it was extraordinarily difficult to settle wage questions until the issue of union security was resolved. Strikes for a ten cents an hour wage increase were often settled for five cents plus the union shop.

Another illustration is furnished by the featherbedding cases decided last year by the United States Supreme Court.³⁹ The American Federation of Musicians had sometimes required movie theatres or night club operators to pay local musicians for standing by whenever a traveling name band played an engagement. NLRA Section 8(b)(6) forbade the practice by making it unfair for a labor organization—

to cause or attempt to cause an employer to pay . . . for services which are not performed or not to be performed.

AFM thereupon shifted its method of protecting local musicians. It refused to permit name bands to play unless the local musicians played overtures or during intermissions. The Supreme Court held that this practice did not violate the statute.⁴⁰ Perhaps a statute could be written

³⁷ An exhaustive and acute analysis is Schlesinger, *A Summary and Critique of the Law of Picketing in New York* (1953).

³⁸ *Fashioncraft, Inc. v. Halpern*, 313 Mass. 385, 48 N.E.2d 1 (1943). Mass. Acts 1950, c. 452, legalized this type of concerted activity.

³⁹ *American Newspaper Publishers Ass'n v. NLRB*, 345 U.S. 100 (1953); *NLRB v. Gamble Enterprises, Inc.*, 345 U.S. 117 (1953). See Note 39 Cornell L.Q. 128 (1953).

⁴⁰ *NLRB v. Gamble Enterprises, Inc.*, *supra* note 39.

to catch up with the union, but not without risk of projecting the government into the determination of what work should be done.⁴¹

This is one of the faults in the present case law with respect to the use of picketing as a technique of union organization. When the old rules forbidding stranger picketing were broken down,⁴² it seemed likely that most industrial States would permit strikes and picketing as methods for achieving organization and winning bargaining rights. But often the union prefaces the concerted activities with a request for recognition and the execution of a contract, neither of which the employer can grant without committing an unfair labor practice. The courts, with considerable logic, reasoned that the law could not fairly forbid the employer to grant recognition and still leave his business at the mercy of the pickets; the objective was therefore held unlawful and the picketing was enjoined.⁴³ Some union lawyers were smart enough to advise their clients not to make demands upon the employer until the union had induced a majority of the employees to become members. "Engage in educational picketing," they said, "or if you must admit that picketing imposes economic pressure, say that you are pressuring the employees and want a contract only after you have achieved majority status." Where the union follows this advice, the legal reasoning that condemns picketing for immediate recognition breaks down. The objective is not unlawful—in the first sense of the term—and some courts, including at least one department of the Appellate Division of the New York Supreme Court, hold that an injunction will not issue to restrain the organizational picketing.⁴⁴ In this state of affairs should we not ask what has been accomplished by the law's forbidding picketing in support of the demand for recognition? Legal logic has received due obeisance; a premium has been put on retaining a smart lawyer; but neither of these accomplishments, I submit, can offset the loss of respect for law which must inevitably follow such verbal distinctions. The layman will echo the words of the early judge who said, "If that is the law, the law is an ass"; but being a layman he is unlikely to go on and say, after the judge, that therefore the law must be different.

The essential weakness of any objectives test is epitomized by the old saying, "There's more than one way to skin a cat." Often the difficulty

⁴¹ The late Senator Taft objected to more stringent "anti-featherbedding" provisions on this ground. 93 Cong. Rec. 6598 (1947).

⁴² *AFL v. Swing*, 312 U.S. 321 (1941) held the rule unconstitutional.

⁴³ See authorities cited in notes 23 and 28 *supra*.

⁴⁴ See authorities cited in note 28 *supra*.

is inescapable; and it should give pause to anyone who is inclined to enlarge the legal restrictions on concerted activities in labor disputes. Sometimes the difficulty can be got over, but only at considerable cost. A number of courts confronted with the absurd distinction between picketing for recognition and organizational picketing have acknowledged their equivalence and eliminated the distinction by holding both unlawful.⁴⁵ Common sense dictates abolition of the distinction but thereafter an injunction cannot be supported on the bare ground that the court, taking its guide from the statute, is merely protecting an employer against reprisals imposed on him for refusing to commit an unfair labor practice. Left without guidance, what warrant has a court for deciding that one group of employees should not be free to use picketing in protecting their labor standards against competition from non-union groups?

The question recalls the pre-Norris-LaGuardia Act criticism of the labor injunction. Judges, it was said, ought not to decide questions of social and economic policy for which there are no accepted standards. Thus phrased the criticism is a little too broad; for all law is an expression of judgments upon questions of policy, most of them social or economic. Generally speaking, however, the policy-making role of the judge is limited to deciding little questions by particularizing standards that have crystallized through general acceptance. The courts may properly make major shifts of policy only by a series of slight changes over long periods of time. The fault inherent in judicial intervention into labor disputes prior to the Norris-LaGuardia Act was that the courts were laying down new and major policies in a controversial area without accepted standards. The practice is no less objectionable today whether the judicial decision intrudes into organizational conflicts or deals with issues on the borderline between management's admitted functions and the familiar subjects of collective bargaining.

This criticism of much judge-made labor law is obviously inapplicable when the legislature forbids strikes or picketing deemed inconsistent with the public interest. The legislature is the proper branch of government to make such decisions, if the government is to make them. The union unfair labor practice provisions of the Taft-Hartley Act are great improvements over the labor injunction, partly because they are enforced by a public agency instead of by private suit, but chiefly because they substitute a deliberate legislative policy for the varying opinions of judges. Yet the effectiveness of even a legislative mandate is im-

⁴⁵ E.g., *Tallman Co. v. Latal*, 25 CCH Lab. Cas. ¶ 68,207 (Mo. 1954).

paired by the controversial character of the issues. The reason lies in a third factor limiting the usefulness of law in labor disputes—the problems of compliance.

A minor aspect of the inherent difficulty of enforcing laws banning strikes or picketing is revealed by experience under NLRA Section 8(b)(4)(D), which bans jurisdictional strikes. At the Taft-Hartley hearings a year ago Mr. John A. Stephens of U. S. Steel Corp. pleaded for stricter legislation and new remedies on the ground that construction jobs had been plagued by jurisdictional strikes despite the existing statutory prohibition.⁴⁶ But passing new laws will not exorcize the problem. So long as feelings run high on any issue, short stoppages will be inevitable however thunderous the legal interdiction or dire the statutory punishment.

The major aspect of the problem of compliance is not enforcement; it is more fundamental. In a liberal democracy sanctions can be invoked only against the occasional wrongdoer. "Government by consent of the governed" does not mean merely a free vote after which the majority imposes its will in total disregard of the interests of the minority. The effectiveness of law depends upon its acceptance by the governed, either because they approve the policy which it expresses, or because it is the law.⁴⁷ What can be done by law alone is therefore limited, unless we are willing increasingly to substitute force for the processes of persuasion.⁴⁸

This limitation upon what can be done by law in a liberal democracy is peculiarly severe in labor relations. To enforce the law by criminal sanctions against large numbers of employees is out of the question. There was, and is, no consensus of opinion about the propriety of many of labor's objectives or of the weapons with which they are pursued. In such instances the decision, whether statutory or judge-made, too obviously involves debatable issues and feelings run too high for it to command acquiescence just because it is the law.

The difficulty is the more acute in regulating the conduct of employees because any restriction of the opportunity to strike or picket curtails a very personal liberty. Since strikes are economic weapons, anti-strike

⁴⁶ Hearings Before the Senate Committee on Labor and Public Welfare on Proposed Revision of the Labor-Management Relations Act of 1947, 83d Cong., 1st Sess. 862-863 (1953).

⁴⁷ Cf. Becker, *Freedom and Responsibility in the American Way of Life*, pp. 23-25 (1945).

⁴⁸ The argument must not be pressed too far, else we should have to join with Hayek in condemning much valuable social and economic legislation.

laws probably are not subject to attack under the Thirteenth Amendment.⁴⁹ But whether a man works or not, whether he joins his fellows in not working or not, are decisions concerning what one does with his person, however powerful may be the labor organization. And I suspect that picketing contains more elements of expression, and that in the end more will be left of the *Thornhill* case,⁵⁰ than recent commentators have acknowledged.⁵¹

I have stressed these five characteristics of legal intervention into labor disputes, which seem to me to limit the usefulness of law, because the tendency of both judges and legislatures has been to overlook them. Perhaps this is not always very harmful to industrial relations—most people have a happy faculty of paying no attention to the worst mistakes of the lawgivers—but it is harmful to law and therefore impairs still farther the usefulness of law in situations where law is needed.

For the inherent weaknesses of law in dealing with labor disputes are only one side of the question. We should err as grievously by exaggerating them as by minimizing their importance. There is need to prevent selfish injuries to the public and to protect legitimate businesses against the harm done by the use of economic weapons to achieve improper or futile goals. The country has flatly rejected the philosophy that "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit . . . are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."⁵² We are not likely to return to that philosophy unless anti-labor forces gather sufficient legislative strength to enact repressive laws driving the center to an extreme reaction.

Nor do I mean to imply that the law should merely reflect practices which everyone already observes. The government has enormous power and must occasionally invoke its sanctions. The struggle on the New York waterfront had to be fought. Furthermore, when the law embodies ideals in which society has faith, the codification shapes men's attitudes even though the sanctions may be imperfect, and thus the law brings the ideals somewhat closer to realization. In most of the country the imposition of a statutory duty to bargain in good faith has had that consequence.⁵³ LMRA Section 301 is also a good illustration. Actions

⁴⁹ *Dorchy v. Kansas*, 272 U.S. 306 (1926); *France Packing Co. v. Dailey*, 166 F.2d 751 (3d Cir. 1948).

⁵⁰ *Thornhill v. Alabama*, 310 U.S. 88 (1940).

⁵¹ See Cox, "Strikes, Picketing and the Constitution," 4 Vand. L. Rev. 574 (1951).

⁵² *United States v. Hutcheson*, 312 U.S. 219, 232 (1940).

⁵³ 61 Stat. 136 § 8(b)(1) (1947), 29 U.S.C. § 148 (Supp. 1953) (Taft-Hartley Act).

for damages for violation of a collective bargaining agreement will neither abolish wildcat strikes nor establish sound industrial relations. In the final analysis employees and their union representatives must recognize and voluntarily perform the responsibilities which the right to bargain carries. But even though the judicial process is rarely invoked, statutory recognition of the legally binding character of collective agreements nourishes the free acceptance of their obligations.

In the final analysis, therefore, the development of legal rules of conduct in labor disputes involves striking a balance—a balance between the need for regulation and the value of freedom, between what the law can do and its inherent limitations. One cannot strike a balance in the abstract. To apply these generalizations would require separate consideration of concerted activities in each kind of controversy between labor and management. I shall suggest the line in a moment by discussing organizational picketing as a concrete illustration, but my principal plea is for reconsideration of the current trend in both statutes and judicial decisions. The considerations to which I have adverted lead me to five conclusions.

First. The courts should be restricted to interpreting and enforcing legislative decisions banning undesirable forms of concerted activity and withdrawing any particular objectives from the area of collective bargaining. The current renaissance of the means and objectives tests is deplorable. Fortunately, the federal courts have adhered more faithfully to the Norris-LaGuardia Act, and the recent decisions excluding State intervention into labor disputes in businesses subject to NLRB jurisdiction may make the State court decisions comparatively unimportant.⁵⁴ The only complete remedy, however, would seem to be revision of the State anti-injunction laws perhaps along the lines of the Massachusetts Anti-injunction Act of 1950.⁵⁵

Second. The difficulties of administering any anti-strike measure framed in terms of an objectives test must be weighed in the balance. The caution is especially pertinent in examining anti-featherbedding amendments.

Third. Any statute which prohibits self-help but provides no solution to the underlying problem is subject to question. The best illustration of this objection is the California law forbidding jurisdictional strikes, which provided no method for resolving controversies over work assignments or questions of representation.⁵⁶

⁵⁴ *Garner v. Teamsters Union*, 346 U.S. 485 (1953).

⁵⁵ Mass. Act 1950, c. 452.

⁵⁶ Cal. Labor Code §§ 1115-1118.

Fourth. It is not enough to conclude that unions ought not to strike or picket in a given set of circumstances. The law should not intervene merely because a count of heads would reveal 51 per cent opposed to such strikes while only 49 per cent would tolerate them. In this respect NLRA Section 8(b)(4) is thoroughly sound. The points at which it revives legal intervention into everyday disputes are trivial in comparison to those it leaves untouched. Also, the law intrudes, by and large, only into areas where the overwhelming consensus of opinion condemns the unlawful conduct. This is clearly true of violence⁵⁷ and strikes to compel the commission of unfair labor practices.⁵⁸ While the jurisdictional dispute provisions are faulty,⁵⁹ there is almost unanimous agreement upon the wisdom of outlawing the jurisdictional strike. Even in the field of secondary boycotts,⁶⁰ there is quite general agreement that some secondary boycotts should be forbidden by law; the debate is over where to draw the line.

Fifth. Wherever possible the law should encourage private machinery for settling disputes instead of building up governmental sanctions. This has been both the strength and the weakness of the jurisdictional dispute provisions of the Taft-Hartley Act. Their enactment strengthened the National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry by forcing the unions to accept the fact that they were no longer free to engage in private warfare without regard to the injury inflicted upon neutrals. On the other hand, the administration of this provision, although intended to be cooperative, has so completely disregarded the accepted practices of the industry as to discourage participation in the work of the Joint Board.⁶¹

The importance of encouraging private responsibility also has a bearing upon the current issue concerning the wisdom of requiring strike votes as suggested in President Eisenhower's recent message to Congress.⁶² There are numerous reasons for concluding that to have the government conduct strike votes would seriously damage labor-management relations. The most fundamental objection, in my opinion, is that the proposal strikes at the heart of collective bargaining by denying

⁵⁷ 61 Stat. 136 § 8(b)(1)(1947), 29 U.S.C. § 148 (Supp. 1953) (Taft-Hartley Act).

⁵⁸ *Ibid.*, § 8(b)(2) and 8(b)(4)(C).

⁵⁹ *Ibid.*, § 8(b)(4)(D) and 10(k). Hearings before the Senate Committee on Labor and Public Welfare on Proposed Revision of the Labor-Management Relations Act of 1947, 83d Cong., 1st Sess. 2428-2431 (1953).

⁶⁰ 61 Stat. 136 § 8(b)(4)(A) and (B)(1947), 29 U.S.C. 148 (Supp. 1953) (Taft-Hartley Act).

⁶¹ See the testimony cited in note 59 *supra*.

⁶² H.R. Doc. No. 291, 83d Cong., 2d Sess. 4 (1953).

the union designated as the representative of all the employees in the bargaining unit the right to make decisions on the most critical of all issues. When a majority of the employees join a union and thereby designate it as their bargaining representative, the union is empowered to act not merely for its members but for all the employees in the unit. Thereafter it is for the union acting through its constitutional processes to decide whether to accept or reject the wages, hours and other conditions of employment offered by the employer. To put such questions to all the employees (as distinguished from the union members) in the form of a strike vote is to deprive labor unions of their power to act on behalf of the bargaining unit. The point which I wish to emphasize here, however, is that if the law must interfere to protect individual workers from being led into a strike by union officialdom, the law should be framed in a way that will encourage private democracy within labor unions. Almost every union constitution provides for a vote of the members prior to a strike. In almost every case the votes are fairly conducted.

The supposed evil is the alleged practice of railroading strike votes through meetings by a voice vote when only a few members are present or the atmosphere is permeated by fear of violence. In 1947 the Committee for Economic Development took note of the public interest in assuring democratic strike votes. It proposed the enactment of legislation "requiring the approval of any strike action by the majority of union members voting." The CED thereby recognized the distinction between a poll of the union members and a poll of all the employees. The proposal to poll all employees strikes at the heart of collective bargaining and impugns the democracy of all unions. The CED proposal acknowledges the fundamental principle of collective bargaining—that the designated representative should decide through its constitutional processes whether to accept the terms of employment offered by the employer or to strike. It would not affect the great bulk of labor unions but would correct abuses in those few instances in which union procedure is not democratic.

If the procedure suggested by CED were thought desirable, it could easily be embodied in two provisions: *First*, every local union acting as exclusive bargaining representative under the NLRA should be required to take a vote of its members prior to a strike. *Second*, the NLRB should be authorized to intervene and supervise the vote only when a petition was filed by a substantial number of union members showing reasonable cause to believe that the required vote would not be fairly conducted

in the absence of government supervision. There would be no need for NLRB action in other cases.

It is my considered opinion that the occasions on which strikes have been called without affording union members a fair opportunity to vote have been so rare as to make legislation unnecessary. Even the CED proposal involves an interference with the internal affairs of voluntary associations which cannot be justified by imaginary abuses or isolated incidents. Nevertheless, the CED proposal is not only preferable to the President's recommendation,⁶³ but it is entirely adequate to correct any evil that may exist.

In conclusion, it seems appropriate to raise one concrete issue concerning the role which law should play in labor disputes. In many States the rule is fast developing that a labor union may not lawfully picket an establishment as a means of organizing its employees. Oregon has enacted a statute forbidding organizational picketing.⁶⁴ The Missouri courts have developed a corresponding rule of decision.⁶⁵ The lower New York courts have moved far in this direction⁶⁶ although it is not too late for the Court of Appeals to reverse the trend by confining *Goodwins, Inc. v. Hagedorn*⁶⁷ to the narrow issue actually presented. In the federal sphere organizational strikes and picketing are generally held lawful,⁶⁸ although not without dissent from one judicial circuit;⁶⁹ but the House Labor Committee has voted to amend the Taft-Hartley Act to outlaw concerted activities except by a certified bargaining representative. To make the issue specific, let us inquire whether the proposal ought to be adopted.

The answer is not as clear as formerly. Prior to the Wagner Act self-help was the only available countermeasure to discriminatory discharges and other employer interference. The tactics of revolution were necessary to break the bonds of fear and habit. Today the way is open to all kinds of organizing techniques, both in the plant and out; and in the older industrial areas an atmosphere favorable to unionization has been established. Why should the community continue to suffer the costs of economic warfare?

It is convenient to break the question down by looking separately at

⁶³ Ibid.

⁶⁴ See note 27 supra.

⁶⁵ *Tallman Co. v. Latal*, 25 CCH Lab. Cas. ¶ 68,207 (Mo. 1954).

⁶⁶ See note 28 supra.

⁶⁷ 303 N.Y. 300, 101 N.E.2d 697 (1951).

⁶⁸ *Perry Norvel Co.*, 80 N.L.R.B. 225 (1948).

⁶⁹ *NLRB v. Capital Service*, 204 F.2d 848 (9th Cir. 1953).

the interests of the employer, his employees as yet unorganized, the union, and the public at large.

The employer's chief injury is loss of business. He may also suffer, though we should not value this interest highly, by having to make concessions to a successful union.

The interests of the employees inside the establishment are harder to evaluate. They may gain materially through unionization, or they may not. Their freedom of choice of representatives for the purposes of collective bargaining is certainly affected if they have already joined another union and if the picketing is effective; for if the picketing is effective, the only way for them to preserve the business that supplies their jobs is to change unions in response to the economic coercion. If the employees do not belong to a union, an effective picket line interferes with their interest in freedom not to join a union. Ardent unionists may argue that this freedom should not be valued highly or that reluctance to join a union is chiefly the product of habit and intimidation by the employer. For the moment I insist only that wherever we place the interest in our scale of values, employees sometimes wish not to join—and have the wish of their own volition.

The competing interests of the outside group are also very real. Spreading union organization may be the only effective way to protect the union wage scale and labor standards against the competition of low cost goods. Strengthening the union by spreading organization is often prerequisite to further improvement of the conditions of labor. Even if one with infinite wisdom were to call the effort unjustified, a society dedicated to a measure of free enterprise must recognize the interest of the picketing group in freedom of action in the struggle for self-advancement. Concerted activities which demonstrate the power of a union may be important not so much because they exert economic coercion upon the unorganized employees but because they offset the unorganized employees' fear of running counter to the employer's wishes, a fear often kept alive and strengthened by the artful use of the privilege of free speech which NLRA Section 8(c) wisely guarantees employers.

Since the public is not a monolithic State in our society, the public interest is largely the sum of the private interests already noted. It should also be observed, however, that the loss attendant upon labor disputes reduces the common wealth and increases the costs of maintaining public order.

On balance it is clear that once the employees have chosen a representative in an NLRB election, the interests injured by further picketing

by the minority outweigh any possible gains, at least until the time is ripe for a new test of employee sentiment. NLRA Section 8(b)(4)(C) embodies substantially this rule.⁷⁰ There is no serious problem of defining the kind of action prohibited; evasion is not easy; and an overwhelming body of opinion supports the legislative judgment.

Section 8(b)(4)(C) ought to be extended, I submit, to cover picketing after the employees have freely voted in an NLRB election not to be represented by a labor union. The present distinction is justified only if society values freedom to bargain through representatives of one's own choosing so much more highly than freedom to reject collective bargaining that it is prepared to allow organized groups in key industries to use their economic power to attach other appropriate units as satellites. Although the national labor policy should be one of encouragement for collective bargaining, instead of cold indifference, it ought not to permit such destruction of self-determination.

Until an election has been held, picketing and other concerted activities ought to be permitted. Drawing a distinction between organizational picketing and picketing for immediate recognition is futile for reasons already stated.⁷¹ Since the rule must permit or condemn both, two considerations tip the balance against legal interference. One is that no one can know the true will of the employees until there has been an organizational campaign leading up to a government sponsored election. Second, a prohibition against all organizational picketing could not command the consent of the governed even though enacted by a majority in the Congress. Public resentment runs strong against unions which carry on picketing for ten months, a year or even three years while they avoid an election because they know that most of the employees would vote against the union. In drafting the Massachusetts Anti-injunction Law of 1950 we found, however, that once assurance was given that minority picketing would be unlawful after an election, there was wide agreement, even among employers, that picketing ought to be permissible until the election. Certainly there is no such consensus of opinion as would lead union men to realize the justice of a more severe restriction.

In drawing such a line two other minor changes would be necessary. First, an employer should be permitted to file a petition under NLRA Section 9 when a union struck or picketed his establishment even though

⁷⁰ The difference is that Section 8(b)(4)(C) extends the interdiction indefinitely whereas the suggested rule would permit picketing as soon as the way was open to a new election.

⁷¹ See p. 601 *supra*.

it made no formal demand for recognition. Second, the union should not be permitted to evade the election and continue the concerted activities by disclaiming an interest. A reasonable time, measured chiefly by the size of the establishment, should be allowed for the election campaign but thereafter the union should be put to the test of the election or forced to withdraw its pickets.